



**RECORD AND STIPULATIONS**

The Board considered the record listed in the July 16, 2002, Award together with the September 5, 2002 Post Award Hearing Transcript of Proceedings as well as the pleadings and other documents contained in the administrative file. Also, on October 16, 2002, claimant's counsel and counsel for "Peterson Properties d/b/a Ceder [sic] Ridge Apartments and Crum & Forster Insurance Company" entered into a "Stipulation" that "1) Hartford Insurance is currently providing workers compensation coverage to Peterson Properties. The policy term is from October 31, 2001 to October 31, 2002. 2) Crum & Forster's coverage of the employers workers compensation risk ended at 12:01 a.m. on October 31, 2001." <sup>2</sup>

**ISSUES**

Kansas courts have long recognized the compensability of repetitive trauma injuries under the Workers' Compensation Act. Generally, the insurance carrier on the risk on the last date of the series of accidents will be responsible for the payment of permanent disability compensation. But liability for the payment of medical benefits incurred pre-award is generally the responsibility of the insurance carrier on the risk at the time the medical treatment expense was incurred. Post-award, medical treatment expenses are generally the responsibility of the insurance carrier on the risk for the date of accident found in the award. Accordingly, post-award medical treatment for the work-related injury is generally paid for by the same insurance carrier that is responsible for the permanent disability compensation. In this case, North River Insurance Company (North River) paid the permanent partial disability awards for both claimant's October 7, 1999, cervical injury and claimant's cumulative trauma injuries to his upper extremities. The date of accident for the cumulative trauma injuries was February 21, 2002. <sup>3</sup>

Respondent and North River do not dispute claimant's need for post-award medical treatment, nor do they dispute that the injuries for which claimant is seeking treatment are work-related. Nevertheless, North River contends it is not responsible for the payment of post-award medical treatment for two reasons: 1) North River was not the insurance carrier for respondent on February 21, 2002; and, 2) claimant has suffered a new series of accidents and injuries since February 21, 2002, as a result of his return to work with respondent in his regular job, without accommodations.

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<sup>2</sup> Stipulation filed October 24, 2002. (Hartford was not a party to this Stipulation, nor has counsel entered an appearance for Hartford).

<sup>3</sup> North River Insurance Company d/b/a/ Crum & Forster Insurance Company now contends it did not provide the respondent's workers compensation insurance coverage on Feb. 21, 2002, although it paid the award. Claimant and respondent agree that Hartford was the respondent's insurance carrier on that date.

Accordingly, respondent and North River contend that the liability for the cost of any additional medical treatment for claimant's upper extremity injuries is the responsibility of Hartford because Hartford was respondent's insurance carrier on February 21, 2002, and continues to provide respondent's workers compensation insurance coverage.

Judge Benedict found claimant had suffered a new series of accidents from performing his regular job duties with respondent after February 21, 2002. Judge Benedict could not, therefore, order respondent and North River to provide additional medical treatment benefits in Docket No. 255,155 for a February 21, 2002, injury. As claimant has not filed a claim for a new series of accidents, post-award medical benefits were denied. Whether claimant's present need for medical treatment is a direct result of the series of cumulative trauma injuries ending February 21, 2001, or instead, is the result of a new series of accidents and injuries, is the issue for the Board's review. Claimant is also seeking review of the ALJ's denial of his request for attorney's fees.

#### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

Both physicians that testified during the original proceedings, Dr. Edward J. Prostic and Dr. Peter Bieri, recommended that claimant undergo bilateral carpal tunnel release surgery. No additional medical evidence has been offered in this post-award proceeding. Claimant was the only witness to testify. His testimony supports a finding that his bilateral upper extremity conditions have worsened since February 21, 2002, and that this worsening is the result of his work with respondent.

Q. (Mr. Taff) Now, what prompts us to come before the judge asking for further medical treatment?

A. (Mr. Brown) My symptoms just keep getting progressively worse and I can't grip, hardly grip anything with my left hand. Its getting worse by sometimes the day, sometimes the hour now. It just depends on how much I use it. <sup>4</sup>

Q. (Mr. Fritschie) The symptoms although they are of the same, nature, they have gotten worse - -

A. (Mr. Brown) Yes. <sup>5</sup>

Q.(Mr. Fritschie) Are they worsening with additional work at Peterson?

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<sup>4</sup> P.A. H. Trans. at 6.

<sup>5</sup> P.A.H. Trans. at 9.

A. (Mr. Brown) Yeah. If I really get in there and dig, yes, I've just got to kind of back up for a few minutes and then start over, you know.

Q. (Mr. Fritschie) Are you essentially doing the same job duties that you described at the regular hearing in this case?

A. (Mr. Brown) Yes, sir.<sup>6</sup>

Claimant declined the recommended surgeries pre-award because he did not want to miss work and lose wages. Therefore, claimant continued working as long as he could. But his symptoms have worsened to the point that he can no longer continue performing his regular job. Claimant now wants the surgeries.

Based on the record provided, the Board finds that claimant has aggravated his upper extremity injuries and that these aggravations constitute a new series of accidents. Accordingly, claimant must file a new claim for compensation for these new accidents and aggravations of his preexisting condition. The ALJ's denial of additional medical treatment benefits under this docketed claim for a series of accidents ending February 21, 2002, is affirmed.

Counsel for claimant also appealed the ALJ's denial of attorney fees. It appears that the ALJ denied claimant's attorney fee request because of the negative result. Claimant was aware of respondent and North River's defenses to this claim before the hearing and still did not file a new claim. Although the Board agrees with the ALJ that a new claim is necessary in order for claimant to receive the requested benefits, it is also true that the question of when a worsening of symptoms constitutes a new accidental injury under the Workers' Compensation Act is often difficult to answer. Accordingly, the Board finds that attorney fees are appropriate in this case. But the fees should be ordered at a reduced rate. Instead of the \$150 per hour requested, the Board finds that claimant is entitled to only \$100 per hour. The fee statement filed by claimant's counsel itemizes 180 minutes of time incurred by counsel. Accordingly, the Board awards claimant's counsel three (3) hours at \$100 per hour for \$300 for this post-award proceeding.<sup>7</sup>

Claimant's counsel, in his brief to the Board, contends that he has expended an additional five (5) hours on this appeal and now requests an award of \$1,350. Respondent objects to that request. As respondent is entitled to a hearing and in light of respondent's objection to that request, claimant's request for attorney fees for time incurred in pursuing this appeal must first be presented to the ALJ.

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<sup>6</sup> P.A.H. Trans. at 10.

<sup>7</sup> K.S.A. 44-536(g).

**Award**

**WHEREFORE**, the Appeals Board affirms that portion of Administrative Law Judge Bryce D. Benedict's December 13, 2002 Order which denies post-award medical treatment, but reverses the denial of attorney fees. Attorney fees in the amount of \$300 are ordered paid by respondent and its insurance carrier.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant  
Donald J. Fritschie, Attorney for Respondent and North River Insurance Co.  
Bryce D. Benedict, Administrative Law Judge  
Director, Workers Compensation Director